Astro Tool & Die Corporation *and* Pamela D. Adams. Case 30–CA–12338

April 18, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On August 16, 1995, Administrative Law Judge Arline Pacht issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed cross-exceptions and an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Astro Tool & Die Corporation, Cudahy, Wisconsin, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(b).

''(b) Discouraging union or protected concerted activity by discriminatorily terminating or issuing discriminatory disciplinary warnings to its employees or in any other manner discriminating against them with regard to their tenure or activities.''

2. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 7 of the Act by prohibiting them from talking to fellow employees about working conditions, by instructing them that complaints about working conditions must be directed solely to management, and by threatening employees with discharge for engaging in protected concerted activities.

WE WILL NOT discourage union or protected concerted activity by discriminatorily terminating or issuing discriminatory disciplinary warnings to our employees or in any other manner discriminating against them with regard to their tenure or activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Pamela D. Adams immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed and WE WILL make her whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL notify Pamela D. Adams that we have removed from our files any reference to her September 29, 1993 warning and discharge on October 25, 1993, and that the warning and discharge will not be used against her in any way.

ASTRO TOOL & DIE CORPORATION

Joyce Ann Seiser, Esq., for the General Counsel.[1]
Michael E. Geary, Esq., of Milwaukee, Wisconsin, for the Respondent.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In agreeing with the judge that the Respondent violated Sec. 8(a)(3) and (1) by discharging employee Pamela Adams, we find it unnecessary to rely on the judge's discussion of the degree of discipline appropriate for the conduct that the Respondent asserts was the basis for her discharge. The judge found, and we agree, that the Respondent's September 29, 1993 warning letter to Adams violated Sec. 8(a)(1). We find merit in the General Counsel's exception to the judge's failure to find that the warning letter also violated Sec. 8(a)(3). In this regard, we note that the judge found that the September 29 letter was motivated not only by Adams' protected concerted activities but also by her union activities. It is well established that the issuance of a formal disciplinary warning letter for discriminatory reasons violates Sec. 8(a)(3).

[2] The judge inadvertently failed to include in his recommended Order language requiring the Respondent to cease and desist from issuing discriminatory disciplinary warnings to its employees. Accordingly, we shall modify the Order and substitute a new notice.

DECISION

STATEMENT OF THE CASE

ARLINE PACHT, Administrative Law Judge. Upon a charge filed on November 15, 1993, by Pamela D. Adams,[2] a complaint issued on January 24, 1994, alleging that Respondent, Astro Tool & Die Corporation,[3] threatened to discharge and subsequently did discharge Adams in violation of Section 8(a)(1) and (3) of the National Labor Relations Act.[4] The Respondent filed a timely answer denying the complaint's substantive allegations.

This case was tried on October 17 and 18, 1994, in Milwaukee, Wisconsin, at which time both parties had an opportunity to examine and cross-examine witnesses, introduce documentary evidence, and argue orally.[5] On the evidence presented in this proceeding and my observation of the witnesses' demeanor, and after consideration of the parties' posttrial briefs, I reach the following

I. FINDINGS OF FACT

A. *Jurisdiction*

At all material times, Respondent, a corporation with an office and place of business in Cudahy, Wisconsin (the facility), has been engaged in the business of fabricating tool, die, and metal stamping. During the calendar year ending December 31, 1992, in the course of conducting its business operations, purchased and received goods and materials valued in excess of $50,000 directly from suppliers outside the State of Wisconsin. Based on this evidence, the complaint alleges, Respondent admits, and I find that Astro Tool & Die is engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

B. *Alleged Unfair Labor Practices*

1. Adams' complaints about working conditions

Pamela Adams began working for Respondent on May 18, 1992, as a parts inspector. Thereafter, she was trained to assemble parts and operate punch presses.

At the start of Adams' career with Respondent, Astro's management, other than President Hans Lorenzen and his son, Plant Manager Elmer Lorenzen, included Shop Supervisor Ralph Heinick, Press and Assembly Room Supervisor Keith Tadeyeske, and Tool Room Supervisor Jim Biermann. Adams testified that under this structure, employees enjoyed a fair degree of flexibility in their work: they were permitted to transfer from one job to another during the course of the day with their supervisors' consent, assemble boxes in the shipping department for use at their own workstations, move pallets with a forklift truck or handcart, and obtain parts from the shipping department or warehouse.

Adams maintained that these liberal shop practices ceased early in August, when Tadeyeske and Heinick were removed as supervisors and Biermann was promoted to plant foreman.[6] As Adams put it, when Biermann took over ''our responsibilities were basically stripped.'' Employees no longer had the discretion to assemble boxes, move pallets, or fetch tools. Adams most begrudged the loss of communication. Before Biermann's promotion, employees could present suggestions about improving job performance to their supervisors. If the idea seemed reasonable, they often granted the employee approval to proceed. In contrast, Biermann simply dictated how work was to be accomplished and did not tolerate proposals about trying new methods.

Adams soon began to discuss what she viewed as Biermann's rigid operating methods with her fellow workers, sharing her concerns about Biermann's strict approach to their work. After several weeks, Adams tried to present her complaints to management. One morning as Elmer Lorenzen was passing her workstation, Adams told him that she wanted to speak to him on behalf of herself and other employees about the changing practices at the facility. Lorenzen insisted that she should speak only for herself and reproached her for putting words into the mouths of other employees. Startled at his response, Adams felt that further conversation with the younger Lorenzen would be pointless. Afterwards, she related her experience with Lorenzen to coworkers Catherine Lomis, Jim Blair, Jennifer Norton, and Pat McGeary.

Adams further testified that in January she began to experience physical discomfort in her wrists that a physician diagnosed as carpal tunnel syndrome and tendonitis. When she told Tadeyeske and Heinick about her problem, they assured her that if she told them when she was in pain, they would transfer her to another job.

Adams found Biermann was far less sympathetic to her malady. On August 11, she was assigned to a task involving highly repetitive small hand movements. Adams related that after working on this task for 6 or 7 hours, she asked Biermann if he would transfer her to another task because of the pain she was experiencing. He refused and said if she did not like it there, she could leave. Angered by his callousness, Adams walked out muttering, ''I work my ass off for nothing.'' (Tr. at 57.) Biermann summoned her back to his office, asking if she had anything more to say. She stated that she told him she was unhappy and in pain and again asked to be shifted to another job, but Biermann still refused to accede to her request. Having no choice, she returned in tears to the work she had been doing. When other employees asked what had happened, she told them about this latest exchange with Biermann.

Adams returned to her physician, reporting that she could continue performing any job at Astro as long as it was not for an extended period of time. The doctor then wrote a letter dated August 26 to President Lorenzen in which she confirmed her diagnosis of Adams' physical ailments and recommended that she not perform certain repetitive tasks for more than prescribed periods of time during the next 4 months. Adams' made sure this letter was in Biermann's hands and discussed its contents with some of her fellow workers.

---

[1] Hereinafter referred to as the General Counsel.

[2] Hereinafter referred to as Adams.

[3] Hereinafter referred to as Astro, Respondent, or the Company.

[4] Hereinafter referred to as the Act.

[5] Documents offered into evidence by the General Counsel and the Respondent are referred to as G.C. Exh. and R. Exh. respectively, followed by the appropriate exhibit number. References to the transcript are cited as transcript followed by the relevant page number.

[6] Tadeyeske was fired; Heinick was demoted and soon left Respondent's employ.

Biermann's account of his August 1 encounter with Adams differs from hers in one salient respect: he acknowledged that while Adams asked to be assigned to another machine, she said nothing about pain in her wrist, only that she was tired of performing the same task all day. Within a half-hour of their exchange, Biermann penned a brief memo to the files that is consistent with his version of the matter. He further testified that at the time, he had no knowledge that Adams had any medical restriction on her work or that she was having difficulty with her wrist. He acknowledged that she later told him that her wrists were sore, whereupon he suggested she see a doctor. He subsequently received the physician's report described above. After that, Biermann stated that whenever Adams complained of wrist pain, he would permit her to change jobs as long as she had been working on a job which was one of those noted in the doctor's letter.

2. Adams' attempts to obtain union representation

Several weeks after Biermann became plant foreman, Adams initiated an effort to obtain union representation. She first broached the idea with coworker Jim Blair who suggested she contact the United Steelworkers. Blair made it clear, however, that he wanted no part of organizing activity and said that if his name surfaced in that context, he would deny involvement. She also spoke with other employees about the pros and cons of union representation.

Sometime in mid-August, Adams contacted the Steelworkers. When Union Representative Douglas Drake returned her call, she told him about what she viewed as adverse working conditions in the plant. She also told him that although other employees were disgruntled, they were too fearful to take corrective action. Drake then cautioned her to keep a low profile and asked her to compile a list of her coworkers' names so that he could contact them to assess their interest in union representation.[7] Pursuant to his request, Adams copied the employees' names from their timecards during her lunchbreak. One of two timecard boxes in the plant was situated close to a table where a group of employees regularly ate lunch with Biermann whose office was nearby. Before giving the list to Drake, Adams placed an ''X'' before the names of six coworkers whom she thought might favor a union and a circled ''X'' before the names of those who had expressed interest to her.[8]

When Adams submitted the list to Drake, he explained he would use it to contact employees to determine whether there was sufficient interest to proceed. A day or two after meeting with him, Adams discussed the Union with four of her coworkers, but only two—Catherine Lomis and Chris Morgan—expressed any enthusiasm.

Adams believed that she spoke to Drake again sometime in late August, but he placed their next contact in early September. Whatever the exact date may have been, they agreed on the contents of their discussion: Drake advised Adams that he was having difficulty in reaching employees; he either did not have their telephone numbers, or the numbers he had were wrong. Drake added that none of the employees whom he did reach was willing to involve him or herself in an organizing campaign. At the hearing, he was unable to remember the names of those with whom he spoke, having erased them from his computer before he knew the matter was in litigation. However, he and Adams both agreed that there was insufficient interest in representation at that time. Adams thought she next spoke with the union agent after her discharge. Drake, however, believed that he next heard from the National Labor Relations Board's Regional Office advising him that an unfair labor practice charge had been filed.

3. Adams' employment record

Respondent awarded Adams three raises during the course of her employment: the first one was for 50 cents an hour at the end of her probationary period and two more were at 25 cents per hour in March and July. This last increase came soon after Adams wrote to both Lorenzens requesting a raise in light of her improved attendance record and efforts to assume new responsibilities.

However, Adams was less than a perfect employee. Her employment record is punctuated by disciplinary warnings, the first three of which she conceded were warranted.

Adams received the first written warning for tardiness on two occasions during her first 2 weeks of employment and was told that another violation during her probationary period, which was extended, would mean immediate discharge. The second written warning came on March 11, 1993.[9] Observing her removing parts and scraps from a press by hand, Tadeyeske cautioned her to use a safety handle magnet for her own protection and said he did not want to see her hands in the machine again. Nevertheless, an hour later, he again saw Adams removing material by hand. This time, he gave her a written warning.

A month later, Adams received a third warning for a second safety infraction. On this occasion, Tadeyeske found her operating a press without the safety lights on, contrary to instructions. He warned her that she could be killed if she worked without them; yet, later that day, noting that she had turned the lights off again, he gave her another written warning.

Adams' next warning 3 months later involved an incident that she said occurred on a Saturday, August 14. Adams explained that she was assigned to pack parts that day for a ''hot job,'' that is, one which had to be ready for shipment by Monday morning. Finding that a box she was using was not adequately assembled, she testified that she first went through proper channels to obtain a new box from the appropriate shipping department supervisor, Chris Tessmer. When he complained that he was too busy to assist her, and with top management away from the plant that day, Adams remedied the problem herself by using a staple gun located in the shipping department less than 30 feet away from her workstation. Adams stated that her sojourn to the shipping department took no longer than a minute. Nevertheless, shipping employee Sue Barmen, the plant foreman's sister, objected to her entry there.

Adams said she was paged to Biermann's office the following Monday where he handed her a written warning for ''UNAUTHORIZED ABSENCE FROM WORK AREA.''

[7] Drake's advice probably was well taken in light of Respondent's opposition to union representation as expressed in its employee manual. (G.C. Exh. 2 at 1.)

[8] Twenty-nine rank-and-file employees' names are listed on G.C. Exh. 21. Additional names on the list, marked by a dash, are those of management officials.

[9] Unless otherwise noted, all events took place in 1993.

(G.C. Exh. 6.) She tried to explain the circumstances but Biermann refused to listen to her. Adams signed the warning under protest, adding the following written comment:

> I was waiting for more parts to do my process. As I was waiting for part [sic] I need 2 stables [sic] in my box and went with box to Shipping. Sue informed me that I was not allowed to so I asked Chris. I was trying to keep busy and use good judgment.

Ibid.[10] Visibly upset and in tears after this episode, Adams described the incident to some of her fellow workers.

Biermann supplied a somewhat different picture of this episode. First, he placed Adams' misconduct on Monday, August 16, not August 14, as she alleged. In fact, Biermann maintained that August 14 was the date on which he met with the employees to expressly instruct them they were not to leave their workstations to obtain supplies or assemble boxes at the shipping department, since it interfered with production. Instead, they were directed to rely on shipping department staff to perform those tasks. He and the Lorenzens were away from the plant on Monday, August 16, but on his return, he learned from his sister that Adams ignored his order and entered the shipping department to assemble her own box. He called her to account the following day, August 17.

Catherine Lomis, called by the Respondent to testify about Adams' conduct, did not paint a flattering portrait of her fellow employee. She described Adams as a shirker who wrote letters and took frequent restroom breaks rather than working. Lomis also said that Adams complained about everything but was unable to remember the subject matter of her invective. Contrary to Adams' belief that Lomis was supportive of the Union, she asserted that ''if there was a union in Astro Tool and Die I would quit.'' (Tr. 180.)

Lomis denied telling anyone in management about Adams' interest in the Union. However, she did tell the Lorenzens about remarks Adams made sometime in August when she returned to her workstation in an agitated state, possibly because she just had received a disciplinary notice. At first, Lomis took the comments humorously, but later thought they might be menacing, and therefore, reported that Adams said she

> ''going to blow Elmer's head off,'' and then she said, ''No; I can't do that. He's not worth spending the rest of my life in jail'' . . . . And then she says, ''What I'm going to do is take a forklift and drive it through his office'' . . . . [T]hen she mentioned something about a swastika. [Tr. at 181.]

Adams admitted that she talked to fellow workers about personal as well as work-related problems while on the job; that is, until she received her next warning on September 29. She conceded, for example, that she complained about Respondent's unfairness in refusing to consider her father for employment because of a purported anti-nepotism policy; yet, several weeks later, found that the Company had hired the mother of another employee. She also admitted saying she would like to drive a forklift through Elmer Lorenzen's new office, and that they, employees, were being treated as if they were in a concentration camp. However, she denied threatening to shoot Lorenzen, as Lomis claimed. Adams said that it was Lomis who facetiously told someone not to give her a gun because she would shoot Lorenzen. At this, Adams commented that it would not be worth it. Further, Adams could not recall having referred to painting swastikas on office windows.

Lomis was not the only employee to relay Adams' comments to management. On August 20, Respondent's president, Lorenzen, asked another employee, Pat McGeary whether he had heard Adams allude to a gun. McGeary had not, but disclosed that Adams had remarked, ''I was wondering how Hans and Elmer would feel—how pissed off they get if I bring in the union here.'' (Tr. 200.)

On the same day that McGeary told him this, Lorenzen transmitted a handwritten memo by fax to the Company's attorney outlining what Lomis reported and also that another employee ''mentioned that she is trying to get the Union in here.'' (G.C. Exh. 8.) Additionally, Lorenzen wrote that ''She's always complaining of the type of job that is given to her'' and was claiming that she acquired carpal tunnel syndrome while working for Astro, when he understood she had the ailment before Respondent hired her. Lorenzen ended his memo by pointing out that Adams had a number of disciplinary warnings and then opined, ''I think she has a mental condition.'' (G.C. Exh. 8.) Lorenzen accompanied his memo with a cover note to counsel that read inter alia: ''We have to do something before it gets out of hand. She is nothing but trouble. Please help.'' (G.C. Exh. 7.) On cross-examination, Lorenzen acknowledged that he told his son about Adams' union comment and believes he also mentioned it to Biermann sometime thereafter. However, Biermann claimed to know nothing about Adams' union activity until after she was discharged.

Adams testified that a month later, Lorenzen and Biermann summoned her to the office where they told her to keep her mouth shut and do her job. Lorenzen than gave her a letter dated September 29, over his signature, which stated:

> It has come to our attention from multiple sources that you are doing a lot of complaining about Astro Tool & Die.
>
> We have employed you to do your job and not to complain to other coworkers about things that you dislike here. As we have told you before, your complaining should only be directed at management and not at your coworkers.
>
> Maybe it would be better if you find other employment. This is your very last warning. [G.C. Exh. 10.][11]

Respondent explained that this meeting came about after a new employee, Steven Diedrich, approached Biermann on September 29, his first day of employment, and asked if Adams always spent her time complaining about the Company.

[10] There is no dispute that Respondent made a practice of tape-recording all disciplinary meetings, including Biermann's August 17 session with Adams.

[11] Lorenzen testified that he asked Respondent's counsel to review the letter before he released it to Adams. During the disciplinary meeting, counsel telephoned Lorenzen who indicated that Adams was in his office at the time.

Adams testified that she took Respondent's warning to heart and, thereafter, kept to herself and refrained from talking to her coworkers. Nevertheless, her career at Astro ended on October 25. She testified that while inspecting parts, she broke one nail while other nails became frayed. Fearing she would scratch the parts with her uneven nails, she filed a few of them, which she claimed took no more than ''a few minutes.'' (Tr. 111.) She then explained that the filing occurred intermittently over a period of time that day. She would inspect parts, then file a broken or frayed nail, then return to inspecting parts. She noticed Biermann near her workstation at one point, but he said nothing to her at the time.

In the early afternoon, Biermann summoned Adams to his office and fired her, telling her he had observed her filing her nails, that she was the worst employee he had ever seen, and did the least amount of work she could get away with. Adams testified that he refused to discuss the matter with her and, she, in turn, refused to sign the disciplinary form he had prepared. When she started toward Elmer Lorenzen's office to ask that he reconsider her discharge, Biermann, implied it would be pointless, since he already had approved the action.

Lomis and Biermann offered views of Adams' conduct on this date that differed materially from her own account. Lomis testified that while she was working, Adams wasted time on the morning of October 25, writing a letter and filing her nails. Growing increasingly angry at working hard while Adams attended to personal matters, Lomis finally complained to Biermann. He then went to the shop floor and watched Adams filing all her nails for 8 to 10 minutes. As he walked past her, she hid her nail file and returned to work. When he later called Adams into his office and told her he had observed her filing her nails, she asserted that she was simply filing one broken nail.

II. DISCUSSION AND CONCLUDING FINDINGS

A. *The Standard of Proof*

The complaint alleges and the General Counsel contends that Respondent twice violated Section 8(a)(3) and (1) of the Act by threatening Adams with discharge on September 29, and discharged her less than a month later on October 25, because of management's fear she would introduce a union into the plant and its irritation with her criticisms of management.[12] The Respondent denies these allegations, arguing that Adams' misconduct, not antiunion bias, motivated the disciplinary actions taken against her.

This is a close case. Both parties introduced evidence that support their theories and undermine the positions taken by their counterparts. Both argue that the witnesses who testified in their respective cases-in-chief are more credible than those presented by opposing counsel. In cases like this, where proof of motivation and credibility often is elusive, it is necessary to evaluate the evidence in accordance with the burden-shifting test of causation adopted by the Board in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

Under *Wright Line*, the Government bears the burden of presenting evidence sufficient to support a prima facie case. To this end, the General Counsel must establish by a preponderance of the evidence that the alleged discriminatee was engaged in concerted, protected activity, that the employer knew of that activity and discriminated against the employee because of it. The Respondent contends that the General Counsel has failed to meet even its initial burden of proving that Adams was engaged in concerted activity.

In order to determine whether an individual employee's activity is concerted, the Board requires that:

> [I]t be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself. Once the activity is found to be concerted, an 8(a)(1) violation will be found if . . . the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action at issue (e.g. discharge) was motivated by the employee's protected concerted activity. [Fns. omitted.]

Meyers Industries, 268 NLRB 493, 497 (1984).[13]

Elaborating on its decision in *Meyers* (*Meyers I*), the Board explained on remand that ''[t]he definition of concerted activities . . . requires some linkage to group action.'' *Meyers II*, supra, 281 NLRB at 884. However, the Board recognized that ''concerted activity could include some, but not all individual activity'' as long as ''the employee acts as a representative of at least one other employee.'' Id. at 884, 885. On applying the foregoing principles to the evidence presented here, I conclude that the General Counsel met her burden.

B. *The General Counsel Established a Prima Facie Case*

The record clearly shows that Adams was a chronic complainer whose complaints occasionally were of a personal nature. However, more often than not, she also discussed concerns with her fellow workers bearing on matters pertaining to the quality and methods of supervision and the treatment of employees in the plant. Specifically, she railed against Biermann's management practices, particularly his refusal to communicate, to permit employees to propose alternative methods to perform certain tasks and to rotate from one job to another during the day, as they had under other supervisors. Even her remarks about Respondent's failure to em-

[12] In his brief, the General Counsel moved to amend the complaint to allege a violatation of *Johnnie's Poultry Co*., 146 NLRB 770 (1964); when it was disclosed during cross-examination of several witnesses that Respondent's counsel had questioned them in preparation for the instant hearing without assuring them that they would suffer no reprisals for their testimony. Technically speaking, the witnesses should have had the protections afforded by *Johnnie's Poultry*. However, the General Counsel's motion to amend, raised for the first time in brief, is wholly untimely. Moreover, the forthright, unpressured testimony of the few witnesses who were deprived of the *Johnnie's Poultry* assurances, convince me that they felt under no obligation to testify on behalf of their employer with or without such guarantees. Therefore, the General Counsel's motion to amend the complaint, to allege that Respondent violated Sec. 8(a)(1) by failing to comply with one aspect of *Johnnie's Poultry*, is hereby denied.

[13] Remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 48 (1985), reaffd. 281 NLRB 882 (1986), enfd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

ploy her father, or Biermann's lack of concern about her wrist pain, take on a quality of concerted activity when viewed as complaints about Respondent's managerial policies. Although Respondent produced two employee witnesses who offered information about Adams that presented her in a bad light, neither contradicted her testimony that others in the plant shared her negative views about various management practices.

Board precedent firmly establishes that complaints about the quality of supervision, such as Adams', are directly related to working conditions. As such, they fall within the rubric of protected concerted activity. See, e.g., *Brother Industries*, 314 NLRB 1218 (1994); *Hoytuck Corp*., 285 NLRB 904 fn. 3 (1987); *Calvin D. Johnson Nursing Home*, 261 NLRB 289 fn. 2 (1982) (see also cases cited there), enfd. 753 F.2d 1078 (7th Cir. 1985).

Further, it is undisputed that when Adams approached the younger Lorenzen to discuss various complaints, she assured him that she was appealing not only for herself but also on behalf of others. In other words, she was attempting to ''bring group complaints to the attention of management, underscoring the concertedness of her activity.'' *Meyers II*, supra at 538.

Lorenzen admitted that he refused to listen to Adams when she told him she was serving as a spokesperson for other employees, telling her flatly that she should speak solely for herself. In a disciplinary note dated September 29, Respondent gave Adams a final warning, on pain of discharge, ''not to complain to other coworkers about things that you dislike here.'' (G.C. Exh. 10.)

Respondent asserts that no proof was adduced that other employees shared Adams' views. While several of her coworkers who testified in this proceeding expressed opposition or disinterest in union representation, none of them contradicted Adams about Biermann's managerial methods. Thus, her testimony that she attempted to present complaints on behalf of herself and others was uncontested. It is ironic that Respondent should claim that Adams was not engaged in concerted activity when it admittedly prevented her from raising group concerns. Respondent may not rely on its own censorship to defeat a finding that in discussing supervisory shortcomings with her fellow employees, and attempting to broach these problems with management, Adams was engaged in protected concerted activity.

A memo written by Hans Lorenzen on August 20 provides unassailable evidence that Respondent knew that Adams was engaged in union activity. The memo describes the problems which Respondent had with Adams. The first item concerned a number of reckless statements Adams made to Lomis on August 16. Lomis reported these remarks to Lorenzen later the same day, conceding that she first found them amusing, and only subsequently thought they were troubling enough to report.[14] Lorenzen could not have taken them too seriously either since he failed to take any action about them when first reported and waited 4 days before mentioning them to his attorney.

Lorenzen confirmed that on August 20, an employee told him that Adams had wondered aloud whether her bosses would be irritated if she brought a union into the shop. He did not take 4 days to react to this information. That same day he prepared a memo and telecopied it to corporate counsel stating, inter alia, that Adams ''is trying to get the union in here.''[15] His assumption that Adams was not engaged in idle musing, and his haste in transmitting this information to counsel on the very day it was received, with a somewhat desperate cover note stating, ''We have to do something before it gets out of hand,'' gives rise to an inference that Adams' union activity played a major role in Respondent's decision to rid itself of an employee whom Lorenzen described as ''nothing but trouble.'' (G.C. Exh. 7.)

The circumstances attending Respondent's final warning to Adams on September 29 also support an inference that Respondent was laying the groundwork for her discharge. The warning was triggered by a new employee's offhand comment to Biermann that Adams was ''doing a lot of complaining about Astro Tool & Die.'' Of course, Respondent's officials could have handled the matter in any number of ways. Biermann could have ignored it, as he apparently ignored Adams' foolish comments which Lomis reported to Lorenzen on August 16. He could have attempted to counter her arguments by addressing them head on. He also could have issued a disciplinary notice himself, as he had on an earlier occasion, particularly since he was the one to whom the new employee complained, or he could have suspended her. Instead, he escalated the matter by bringing Adams' conduct to the attention of the company president.

Beirmann denied knowing about Adams' union activity at the time of this incident. However, President Lorenzen was fairly certain he told Biermann about Adams ''trying to get a union in here,'' shortly after he found this out himself on August 20. It is difficult, even impossible, to imagine that Lorenzen would have failed to convey this fact to his plant foreman when it was important enough to include in a letter to his attorney. It is equally unlikely that Biermann would have transferred a disciplinary matter to Lorenzen without a specific and compelling reason for doing so; that is, knowledge that Lorenzen had decided to fire her. Biermann's claim that he had no knowledge of Adams' union activity until after her discharge is implausible. This was not a plant where employees discreetly withheld information from their supervisors. For instance, Biermann disclosed that he learned of Adams' dissatisfaction with his management decisions through the grapevine. In fact, his effort to deny knowing of Adams' interest in union representation compels the conclusion that it was a significant, if not decisive, factor motivating his conduct toward her.

[14] Adams admitted telling Lomis it would not be worth her while to shoot Lorenzen. However, she maintained that it was Lomis who first alluded to using a gun. Adams seemed far more capable of making a flippant comment like this than did Lomis, but it hardly matters who is responsible because clearly it was said in a jocular fashion. No one could possibly take the remark seriously when placed in context. Adams probably did refer to painting swastikas on windows because this was consistent with her accusing Respondent of treating the employees as if they were in a concentration camp. Moreover, she presented herself as a person who would not hesitate to make outrageous statements solely for their shock value.

[15] Respondent failed to explain why Lorenzen wrote in his memo to the company attorney that Adams was ''trying to get the Union in here,'' when he testified that the employee, McGeary, reported that she merely had wondered if Respondent would be irritated if she sought union representation. Logic suggests that McGeary had to have said something more about Adams' union activity that what either he or Lorenzen recalled at trial.

In unprecedented fashion, Hans Lorenzen, who was semiretired and was not involved in day-to-day management or supervision at the plant, conducted an investigation into Adams' activity by questioning other employees. Even more remarkable, Lorenzen sent the disciplinary warning to counsel for review before returning it to Biermann to present to Adams. Respondent evidently exercised special caution before issuing this memo, investing it with an importance that was not attached to other warnings given before her union activity became known. Lorenzen's written instruction to Adams that she should direct her complaints to management, not to her coworkers, violates Section 8(a)(1) on its face by interfering with her right to engage in protected concerted activity. His concluding paragraph suggesting that she should quit Respondent's employ and that ''[t]his is your very last warning'' indicates that she had no future at Astro as long as she continued to complain about working conditions. The manner in which this disciplinary memo was handled and the message it conveyed suggests that Respondent was strengthening a paper trail intended to lead to Adams' discharge.

Respondent argues that Adams was not engaged in responsible discussion of problems of general concern but in individual griping. In taking this position, Respondent misapprehends the nature of concerted activity as that term of art is defined in Board and court precedent. For example, in *Jeannette Corp*., 217 NLRB 653 (1975), enfd. 532 F.2d 916 (3d Cir. 1976), the administrative law judge cited *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964), wherein the court explained that ''[t]o qualify as concerted, protected activity,'' the employee must be engaged in conduct ''with the object of initiating or inducing or preparing for group action or . . . [have] some relation to group action in the interest of employees.'' The court went even further in giving an expansive reading to the concept of concerted activity:

> [P]reliminary discussions are [not] disqualified as concerted activities merely because they have not resulted in organized action or in positive steps toward presenting demands. ''. . . [i]nasmuch as almost any concerted activity for mutual aid and protection has to start with some kind of communication between individuals it would come very near to nullifying the rights of organization . . . if such communications are denied protection because of lack of fruition.''

Id. at 685. To the same effect, in *R. J. Liberto, Inc*. 235 NLRB 1450 (1978), the administrative law judge, with Board affirmance, aptly reasoned that

> [w]hether [the employee's] facts or interpretation were correct, he was entitled to discuss with his fellow employees his perception of working conditions and employee problems. Respondent, to be sure had a right to try to counter his arguments, but it had no right to attempt to muzzle his discussions with fellow employees of issues relating to their working conditions.

Respondent did not challenge Adams' contention that she kept a low profile after receiving Lorenzen's warning. Nevertheless, 3 weeks later, she provided her employer with an opportunity to fire her as if it were a legitimate response to her misconduct. However, since that warning was given for illegitimate reasons, it follows that the subsequent discharge that relied on it also was unlawful.

The immediate cause assigned for Adams' discharge was that she filed her nails on company time. Biermann did not specifically refute Adams' claim that other employees had taken time for personal grooming at their workstations. Instead, he asserted that he never before had seen an employee engaged in improper behavior while at work. Experience alone compels me to discredit such an unrealistic assertion. Having found that the Respondent's previous warning to Adams was wrongfully issued because it was triggered by displeasure with her union proclivities, and intended to stifle her from engaging in discussions critical of Respondent's management style and methods, it follows that a decision to discharge her, based on such flawed underpinnings, cannot be upheld.

In light of the foregoing discussion, I conclude that the General Counsel adduced sufficient evidence to meet each of the elements required to establish a prima facie case that Respondent issued a disciplinary warning, and then terminated Adams because of its animus to her union proclivities and involvement in protected, concerted activities. Accordingly, under *Wright Line*, the burden shifted to Respondent to prove by a preponderance of the evidence that it would have disciplined and terminated Adams even if she had not engaged in conduct. protected by the Act. *Wright Line*, supra.

C. *Respondent Failed to Meet its Wright Line Burden*

Undoubtedly, Adams occasionally supplied her employer with grounds to issue disciplinary notices that had nothing to do with conduct protected by the Act. I refer specifically to the warning notices that preceded the August 20 date when Lorenzen clearly had knowledge that Adams was in some way engaged in union activity. The nice question here is whether Respondent would have issued a warning notice on September 29 and terminated her on October 25 in the absence of animus toward her protected concerted activity. Although not altogether free from doubt, I conclude that she would not have been disciplined on September 29, or fired less than a month thereafter were it not for Respondent's animus to her union and other protected concerted activity.

Prior to August 20, when Company President Lorenzen wrote to Respondent's counsel with some alarm, that Adams was ''trying to get a union in here,'' she had three justifiable disciplinary notices in her personnel file, none of which appear to have been prompted by discriminatory motives. Thus, the only warning notices that Adams received after Respondent learned of her interest in the Union were those of September 29 and the final discharge notice of October 25. As discussed above, the September 29 warning was a direct assault on her right to share her criticisms about conditions of employment with her coworkers. Therefore, it cannot be invoked as a legitimate predicate for Respondent's decision to discharge her.

Adams' conduct on October 25 was not commendable. I am persuaded that Lomis was a credible witness who, justly offended when Adams failed to carry her fair share of their workload, reported her behavior to Biermann. I further have little doubt that Biermann observed Adams filing her nails for 10 or more minutes. Adams explanation of her conduct on this occasion was confused and contradictory. Initially she claimed she filed only one broken nail. She then changed her

account to say she needed to file all of her frayed nails, still later she alleged that she filed her nails intermittently while inspecting parts.[16]

Spending 10 or more minutes filing one's nails on the job is unacceptable. Adams' conduct may have deserved rebuke; but all things considered, it hardly provided compelling grounds for termination. A warning or even a brief suspension would have been appropriate, particularly when others at the plant also wasted time in personal grooming. Further, Respondent's employee manual provides that breaches of conduct could subject an employee to disciplinary action ranging from a verbal or written warning to suspension and lastly, termination, depending on the nature of the offense and the circumstances involved. Without explanation, Respondent leaped from an unlawful written warning to discharge without ever having chosen to suspend Adams. The severe sanction meted out to her may be contrasted with Respondent's treatment of another employee, Ross Kurylo, who had ''a record of continual tardiness, eight sick days . . . this year . . . an additional personal day . . . [and] one unexcused absence. Following numerous verbal warnings and a prior written warning,'' Respondent found that Kurylo's ''continued pattern of tardiness and absenteeism'' warranted no more than a 3-day suspension. (G.C. Exh. 17.) Respondent's more stringent treatment of Adams strengthens the conclusion that Respondent was eager to rid itself of a prounion, vocal critic of management.

Respondent might have fired Adams for legitimate reasons at some later date, for she apparently irritated not only her supervisors, but some of her coworkers as well. However, on the evidence presented here, it is impossible to conclude that Respondent would have terminated Adams on October 25 in the absence of her involvement in protected concerted activity and prounion stance. Accordingly, I find that Respondent violated Section 8(a)(1) and (3) of the Act by discharging Adams on September 29.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By prohibiting its employee, Pamela Adams, from discussing working conditions with her fellow employees, ordering her to direct her complaints solely to management, and threatening her with discharge in the event she continued to engage in protected concerted activity, Respondent violated Section 8(a)(1) of the Act.

4. By terminating Adams because she engaged in union and other protected concerted activity, Respondent violated Section 8(a)(1) and (3) of the Act.

5. The unfair labor practices described in paragraphs 3 and 4 above affect commerce within the meaning of Section 2(6) and (7) of the Act.

[16] This was not the first time that Adams offered contradictory evidence. When justifying her disregard of Biermann's order to refrain from entering the shipping department, Adams testified that she did so only after attempting to find the proper supervisor in that area. However, when she explained her behavior on the disciplinary form, she wrote that she sought the supervisor only after attempting to enter the shipping department.

THE REMEDY

Having found that the Respondent engaged in the above-described unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom, and take certain affirmative action designed to effectuate the policies of the Act.

Specifically, Respondent shall be directed to cease prohibiting employees from discussing working conditions with their fellow employees, directing them to relay their complaints about such conditions solely to management and threatening them with discharge if they fail to comply.

In addition, having unlawfully discharged Pamela Adams, the Respondent shall be ordered to offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Further, Respondent shall be directed to post the notice to employees appended to this decision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The Respondent, Astro Tool & Die Corporation, Cudahy, Wisconsin, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act by prohibiting them from talking to fellow employees about working conditions, instructing them that complaints about working conditions shall be presented solely to management, or threatening them with discharge if they engage in such activities.

(b) Discouraging union or protected concerted activity by discriminatorily terminating employees, or in any other manner discriminating against them with regard to their tenure or employment.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Pamela Adams immediate and full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed, and make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of this decision.

(b) Remove from its files any reference to the unlawful warning issued to Pamela Adams on September 29, 1993, and to her discriminatory discharge on October 25, 1993, and notify her in writing that this has been done and that neither

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

the warning nor the discharge will be used against her in any way.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its facility in Cudahy, Wisconsin, copies of the attached notice marked ''Appendix.''[18] Copies of the notice, on forms provided by the Regional Director for Region 30, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees customarily are posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''